

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHN S. DEPETRO,	)	
	)	No. CV-10-374-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 5, 2012 (ECF No. 13, 15). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Lisa Goldoftas represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge (ECF No. 7). On October 3, 2011, plaintiff filed a reply (ECF No. 17). After reviewing the administrative record and the briefs filed by the parties, the court **grants** Defendant's Motion for Summary Judgment (ECF No. 15).

**JURISDICTION**

Plaintiff protectively applied for supplemental security income (SSI) alleging an amended onset date as of the date of filing, April 12, 2007 (Tr. 39-40, 146-151). The application was denied initially and on reconsideration (Tr. 108-111, 113-114).

1 Plaintiff alleged disability due to depression, post traumatic  
2 stress disorder (PTSD), and anti-social personality disorder (Tr.  
3 172).

4 Administrative Law Judge (ALJ) Gene Duncan held hearings on  
5 September 8 and December 10, 2008. Plaintiff, represented by  
6 counsel, and psychological and vocational experts testified (Tr.  
7 30-32, 35-79). On January 9, 2009, the ALJ issued an unfavorable  
8 decision (Tr. 13-27). The Appeals Council denied review on October  
9 4, 2010 (Tr. 1-3), making the ALJ's decision the final decision of  
10 the Commissioner appealable to the district court pursuant to 42  
11 U.S.C. § 405(g). Plaintiff filed this action for judicial review  
12 on October 26, 2010 (ECF No. 1, 4).

#### 13 STATEMENT OF FACTS

14 The facts have been presented in the administrative hearing  
15 transcript, the ALJ's decision, and the briefs of the parties.  
16 They are only briefly summarized here.

17 Plaintiff was 46 years old at onset (Tr. 146). He completed  
18 the ninth grade and later earned a GED (Tr. 36, 176). He has  
19 worked as a dishwasher, and last worked in 1995 (Tr. 172-173). He  
20 did not get along with coworkers (Tr. 59). Plaintiff testified he  
21 cannot work because of his mental symptoms. He doubted he could  
22 keep a job (Tr. 67, 172). He abused drugs and alcohol in the past.  
23 Plaintiff testified he last used street drugs about four years  
24 before the hearing on December 10, 2008, and last drank 3 to 4  
25 months before the same hearing (Tr. 37-38, 245).

26 Plaintiff's function report filed with his application  
27 indicates he cares for a cat, has no problems with personal care,  
28 and needs no grooming reminders. He fixed easy meals daily,

1 cleaned, and shopped once a week. He walked and used public  
2 transportation. He has problems following instructions, but  
3 follows written and spoken instructions "pretty good." He alleged  
4 problems with memory, concentration, understanding, and getting  
5 along with others (Tr. 159-163).

#### 6 SEQUENTIAL EVALUATION PROCESS

7 The Social Security Act (the Act) defines disability as the  
8 as the "inability to engage in any substantial gainful activity by  
9 reason of any medically determinable physical or mental impairment  
10 which can be expected to result in death or which has lasted or  
11 can be expected to last for a continuous period of not less than  
12 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
13 also provides that a Plaintiff shall be determined to be under a  
14 disability only if any impairments are of such severity that a  
15 plaintiff is not only unable to do previous work but cannot,  
16 considering plaintiff's age, education and work experiences,  
17 engage in any other substantial gainful work which exists in the  
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
19 Thus, the definition of disability consists of both medical and  
20 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
21 (9<sup>th</sup> Cir. 2001).

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled.  
24 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
25 is engaged in substantial gainful activities. If so, benefits are  
26 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
27 the decision maker proceeds to step two, which determines whether  
28 plaintiff has a medically severe impairment or combination of

1 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination  
3 of impairments, the disability claim is denied. If the impairment  
4 is severe, the evaluation proceeds to the third step, which

5 compares plaintiff's impairment with a number of listed

6 impairments acknowledged by the Commissioner to be so severe as to  
7 preclude substantial gainful activity. 20 C.F.R. §§

8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P

9 App. 1. If the impairment meets or equals one of the listed

10 impairments, plaintiff is conclusively presumed to be disabled.

11 If the impairment is not one conclusively presumed to be

12 disabling, the evaluation proceeds to the fourth step, which

13 determines whether the impairment prevents plaintiff from

14 performing work which was performed in the past. If a plaintiff is

15 able to perform previous work, that Plaintiff is deemed not

16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At

17 this step, plaintiff's residual functional capacity (RFC)

18 assessment is considered. If plaintiff cannot perform this work,

19 the fifth and final step in the process determines whether

20 plaintiff is able to perform other work in the national economy in

21 view of plaintiff's residual functional capacity, age, education

22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),

23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon plaintiff to establish  
25 a *prima facie* case of entitlement to disability benefits.

26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*

27 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is

28 met once plaintiff establishes that a physical or mental

1 impairment prevents the performance of previous work. The burden  
2 then shifts, at step five, to the Commissioner to show that (1)  
3 plaintiff can perform other substantial gainful activity and (2) a  
4 "significant number of jobs exist in the national economy" which  
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
6 Cir. 1984).

#### 7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a  
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
10 the Commissioner's decision, made through an ALJ, when the  
11 determination is not based on legal error and is supported by  
12 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
13 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
14 "The [Commissioner's] determination that a plaintiff is not  
15 disabled will be upheld if the findings of fact are supported by  
16 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
17 Cir. 1983)(citing 42 U.S.C. § 405(g)).

#### 18 ALJ'S FINDINGS

19 At step one, the ALJ found plaintiff did not engage in  
20 substantial gainful activity after the amended onset date of April  
21 12, 2007 (Tr. 16). At steps two and three, he found plaintiff  
22 suffers from major depressive disorder, antisocial personality  
23 disorder, and hepatitis C, impairments that are severe but do not  
24 meet or medically equal a Listed impairment (Tr. 16, 18-19). The  
25 ALJ found plaintiff's allegations regarding his limitations were  
26 not entirely credible (Tr. 22-24). ALJ Duncan assessed an RFC for  
27 a range of light work (Tr. 20-21). At step four, relying on a  
28 vocational expert, the ALJ found plaintiff is unable to perform

1 any past relevant work (Tr. 26). At step five, again relying on  
2 the VE, the ALJ found plaintiff can perform other jobs such as  
3 components assembler and agricultural sorter (Tr. 26). The ALJ  
4 found plaintiff has not been disabled as defined by the Social  
5 Security Act at any time from onset through the decision date (Tr.  
6 27).

### 7 **ISSUES**

8 Plaintiff first alleges the ALJ erred when he accepted the  
9 testifying expert's opinion over those of examining psychologists  
10 Brown<sup>1</sup> and Islam-Swart.<sup>2</sup> Second, he alleges the ALJ erred when he  
11 failed to discuss the opinion of James Bailey, Ph.D., an agency  
12 consultant (ECF No. 14 at 13-20). Plaintiff does not challenge the  
13 ALJ's adverse credibility determination on appeal.

14 The Commissioner answers that the ALJ gave specific and  
15 legitimate reasons supported by substantial evidence for rejecting  
16 some of the examiners' opinions; properly weighed the opinion of  
17 testifying psychologist Ronald Klein, Ph.D., and any error in  
18 failing to discuss Dr. Bailey's opinion was clearly harmless  
19 because it was not probative and was inconsequential to the  
20 ultimate finding of nondisability. The Commissioner asks the court  
21 to affirm (ECF No. 16 at 8-14).

### 22 **DISCUSSION**

#### 23 **A. Standards for weighing opinion evidence**

24 In social security proceedings, the claimant must prove the  
25 existence of a physical or mental impairment by providing medical  
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27 <sup>1</sup>Debra Brown, Ph.D.

28 <sup>2</sup>Kayleen Islam-Swart, Ph.D.

1 evidence consisting of signs, symptoms, and laboratory findings;  
2 the claimant's own statement of symptoms alone will not suffice.  
3 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
4 on the basis of a medically determinable impairment which can be  
5 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
6 medical evidence of an underlying impairment has been shown,  
7 medical findings are not required to support the alleged severity  
8 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
9 1991).

10 A treating physician's opinion is given special weight  
11 because of familiarity with the claimant and the claimant's  
12 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
13 1989). However, the treating physician's opinion is not  
14 "necessarily conclusive as to either a physical condition or the  
15 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
16 751(9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
17 treating physician than an examining physician. *Lester v. Chater*,  
18 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
19 given to the opinions of treating and examining physicians than to  
20 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
21 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
22 are not contradicted, they can be rejected only with clear and  
23 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
24 ALJ may reject an opinion if he states specific, legitimate  
25 reasons that are supported by substantial evidence. See *Flaten v.*  
26 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
27 1995).

28 In addition to the testimony of a nonexamining medical

1 advisor, the ALJ must have other evidence to support a decision to  
2 reject the opinion of a treating physician, such as laboratory  
3 test results, contrary reports from examining physicians, and  
4 testimony from the claimant that was inconsistent with the  
5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
6 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9<sup>th</sup>  
7 Cir. 1995).

8 **B. Testifying psychologist**

9 Dr. Klein reviewed the entire record. He rejected Dr. Brown's  
10 PTSD diagnosis. He testified her PTSD diagnosis has no support,  
11 basis, or justification in the record. Dr. Klein points out in  
12 Exhibit 12F "she relates in one sentence that because this  
13 gentleman had been physically beaten up by his father she assigns  
14 PTSD to him" (Tr. 41). There is no further basis offered for the  
15 diagnosis. Dr. Klein encouraged the ALJ to give the PTSD diagnosis  
16 little if any weight (Tr. 41).

17 Similarly, Dr. Klein opined Dr. Brown's bipolar disorder  
18 diagnosis is more obviously attributable to DAA. With respect to  
19 evidence of DAA, Dr. Klein observes "we still have some ongoing  
20 alcohol usage with this gentleman." He notes Dr. Brown's October  
21 2001 evaluation mentions three episodes of intoxication leading up  
22 to the second evaluation (Tr. 41-42, citing Exhibit 2F).

23 Dr. Klein opined the evidence does not support Dr. Brown's  
24 bipolar disorder diagnosis:

25 "nor does she make the . . . more obvious connection  
26 between the drug and alcohol use and symptoms that might  
27 be misinterpreted as bipolar disorder. Because obviously  
28 the kinds of drugs, amphetamines, meth particularly and  
marijuana can mimic some of the symptoms of bipolar  
disorder. And so when there's an active DA and A [drug  
abuse and alcohol abuse] history it's incumbent upon



1 clinicians to be able to identify, well, wait a minute,  
2 that's drug related and not a separate psychiatric  
diagnosis in and of itself."

3 (Tr. 42).

4 Dr. Klein reviewed Dr. Brown's test results. He noted  
5 plaintiff's trailmaking test results changed from normal to mildly  
6 impaired over the course of different examinations. He opined  
7 this test result does not change from normal to mildly impaired  
8 unless there is some damage to the brain, such as a stroke or  
9 severe blow to the head. Dr. Klein observed plaintiff has no  
10 history of brain injury (Tr. 42-43, 268, 291).

11 Dr. Klein pointed out Dr. Brown incorrectly characterized  
12 plaintiff's MMPI results (obtained during testing on the same day  
13 as the trailmaking tests) as valid, even though "it is [they are]  
14 clearly not." Dr. Klein noted some extremely elevated scores may  
15 suggest malingering: "I think he was trying to overplay the card  
16 at that point." (Tr. 43, referring to Exhibit 3F).

17 An ALJ may reject a treating or examining physician's  
18 contradicted opinion in reliance on the testimony of a  
19 nonexamining advisor when the testimony is supported by other  
20 evidence in the record and is consistent with it. *See Andrews v.*  
21 *Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995); *Allen v. Heckler*, 749  
22 F.2d 577, 580 (9<sup>th</sup> Cir. 1984).

23 Dr. Klein's opinion is supported by other evidence, including  
24 the records of plaintiff's primary care physician, Robert Margraf,  
25 M.D. The ALJ observes Dr. Margraf noted in June 2007 plaintiff has  
26 not suffered any acute depressive episodes since he has been  
27 taking abilify and clean from drug abuse (Tr. 24, referring to Tr.  
28 261). In October 2007, plaintiff says he "feels things are going

1 pretty well" (Tr. 302). In January 2008, Dr. Margraf notes  
2 plaintiff "feels he is sleeping well currently;" and "feels he is  
3 doing pretty well." In June 2008, plaintiff says he is "doing  
4 well" and sleeping fine. There are no reported manic episodes. He  
5 denies major depressive symptoms and says his "spirits are good at  
6 present." (Tr. 304, 306). Plaintiff told Dr. Margraf on at least  
7 two occasions that obtaining SSI monetary benefits would improve  
8 his life, and he would be able to do volunteer work (Tr. 24,  
9 Exhibits 8F and 13F, Tr. 264, 302, 309).

10 The ALJ is correct. Dr. Margraf's records support Dr. Klein's  
11 opinion.

#### 12 **C. Examining psychologists**

13 Plaintiff alleges the ALJ failed to properly credit the  
14 opinions of examining psychologists Drs. Brown and Islam-Swart,  
15 and failed to give adequate reasons for rejecting them, ECF No. 14  
16 at 13-20. The Commissioner answers that the ALJ properly  
17 discounted the examiners' opinions because they "failed to  
18 delineate" the effects of plaintiff's admitted drug use, their  
19 opinions lack objective findings, test results undermine  
20 plaintiff's credibility [to the extent the examiners relied on  
21 plaintiff's less than credible statements in rendering their  
22 opinions], and some of the opinions are internally inconsistent,  
23 ECF No. 16 at 11-13. The Commissioner asserts any error by the ALJ  
24 in failing to correctly identify the number of reports by the  
25 examiners is harmless, ECF No. 16 at 9-11.

26 The Commissioner is correct.

27 As noted, Dr. Brown's PTSD and bipolar disorder diagnoses  
28 were properly rejected as unsupported by the evidence, the

1 symptoms are more obviously the result of DAA, and some test  
2 results are invalid (trailmaking, MMPI-2). Similarly, Dr. Brown's  
3 2008 assessed severe limitations are refuted by treating Dr.  
4 Margraf's records, as the ALJ notes (Tr. 23-26)(*cf. e.g.,* Tr. 314-  
5 315 with Tr. 304, 306).

6 Dr. Klein as well as the ALJ reviewed Dr. Swart-Islam's March  
7 2005 report, about two years before onset (Tr. 24-25, 43, report  
8 at 229-236). She notes plaintiff's current use of marijuana and  
9 alcohol (Tr. 231). The ALJ opines the report is internally  
10 inconsistent. Plaintiff told Dr. Swart-Islam he was taking celexa,  
11 it was helping with his symptoms, and he believed he did not need  
12 medication for depression at that time.<sup>3</sup> Nonetheless, Dr. Islam-  
13 Swart assessed a GAF of 50 indicating serious symptoms or  
14 impairment (Tr. 24, 229, 231). The ALJ is correct. Plaintiff's own  
15 statements about his functioning, both to Dr. Margraf and Dr.  
16 Islam-Swart, undercut Dr. Islam-Swart's opinion.

17 Dr. Islam-Swart makes no effort to reconcile the internal  
18 inconsistency between plaintiff's description of functioning and  
19 her assessment of functioning. This is a specific, legitimate  
20 reason, supported by substantial evidence, for the ALJ to discount  
21 Dr. Islam-Swart's contradicted opinion. *See Lester*, 81 F.3d at  
22 831; *Roberts v. Shalala*, 66 F.3d 179 (9<sup>th</sup> Cir. 1995).

23 An ALJ need not accept the opinions of a doctor if that  
24 opinion is brief, conclusory, and inadequately supported by  
25 clinical findings, *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup>  
26 Cir. 2005), nor is he required to credit opinions contradicted by

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28 <sup>3</sup>Plaintiff also opined diagnosed bipolar disorder is the  
"mental equivalent of a head cold" (Tr. 229).

1 a claimant's testimony.

2 Credibility determinations bear on evaluations of medical  
3 evidence when an ALJ is presented with conflicting medical  
4 opinions or inconsistency between a claimant's subjective  
5 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d  
6 683, 688 (9<sup>th</sup> Cir. 2005). The ALJ gave clear and convincing  
7 reasons for his adverse credibility determination, and because  
8 unchallenged it is a verity on appeal. When he assessed the  
9 conflicting medical evidence, the ALJ considered (in part)  
10 plaintiff's inconsistent statements regarding drug use and failure  
11 to follow recommended treatment (Tr. 23-25). These are clear and  
12 convincing reasons supported by substantial evidence. *Thomas v.*  
13 *Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002)(inconsistent  
14 statements diminish credibility); *Fair v. Bowen*, 885 F.2d 597, 603  
15 (9<sup>th</sup> Cir. 1989)(failure to follow medical treatment diminishes  
16 credibility). The ALJ's unchallenged credibility assessment is  
17 free of error and additionally supports his rejection of some of  
18 the examiners' assessed limitations.

19 **D. Agency consultant**

20 Last, plaintiff alleges the ALJ should have credited or  
21 discussed the opinion of consultant James Bailey, Ph.D. (affirmed  
22 by Patricia Kraft, Ph.D.,) ECF No. 14 at 19; 17 at 4. The  
23 Commissioner answers that the ALJ is not required to credit  
24 evidence like this which is not significant or probative, and  
25 error if any is harmless because the evidence was inconsequential  
26 to the ultimate determination of nondisability, ECF No. 16 at 13-  
27 14.

28 The Commissioner is correct.

1 Dr. Bailey reviewed Drs. Brown and Islam-Swart's reports,  
2 which as noted were properly discredited by Dr. Klein and  
3 ultimately by the ALJ. Consequently, Dr. Bailey's opinion was not  
4 probative evidence and the ALJ was not required to discuss it. See  
5 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9<sup>th</sup> Cir. 1984)(an ALJ  
6 "must explain why significant probative evidence is rejected").

7 It is the role of the trier of fact to resolve conflicts in  
8 evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The ALJ  
9 acted in accordance with his responsibility to determine the  
10 credibility of the medical evidence, and he gave specific,  
11 legitimate reasons for discrediting particular opinions. See  
12 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992);  
13 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9<sup>th</sup> Cir. 1989).

14 Although the evidence may support more than one rational  
15 interpretation, the Court may not substitute its judgment for that  
16 of the Commissioner where, as here, proper legal standards were  
17 applied in weighing the evidence and making the decision. See  
18 *Brawner*, 839 F.2d at 433; *Sprague*, 812 F.2d at 1229-1230.

19 The ALJ properly weighed the medical evidence of  
20 psychological limitations and plaintiff's credibility. He came to  
21 a reasonable conclusion based on the evidence in the record, and  
22 that ends the court's inquiry on appeal. *Bayliss v. Barnhart*, 427  
23 F.3d 1211, 1214 n. 1 (9<sup>th</sup> Cir. 2005)("If the record would support  
24 more than one rational interpretation, we defer to the ALJ's  
25 decision.").

#### 26 CONCLUSION

27 Having reviewed the record and the ALJ's conclusions, this  
28 court finds that the ALJ's decision is free of legal error and

1 supported by substantial evidence..

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment (**ECF No. 15**) is  
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
6 **DENIED.**

7 The District Court Executive is directed to file this Order,  
8 provide copies to counsel for the parties, enter judgment in favor  
9 of Defendant, and **CLOSE** the file.

10 DATED this 3rd day of August, 2012.

11  
12 s/ James P. Hutton  
13 JAMES P. HUTTON  
14 UNITED STATES MAGISTRATE JUDGE  
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